No. 83-269

In The
Supreme Court of the United States
October Term 1983

CLAUDE HARVEY SEGREST, JR.,
Petitioner,

vs.

PATSY SUE SEGREST,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Is a final 1977 state court divorce decree dividing military retirement benefits res judicata as to the propriety of that division and protected from the retroactive effect of *McCarty v. McCarty*?

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OPINION BELOW

The judgments and opinions in the courts below are attached as appendices to Petitioner's petition.

STATEMENT OF THE CASE

The statement included in the petition filed herein is essentially correct.

REASONS FOR DENYING THE WRIT

The Petitioner sets out three reasons which he argues empower the Supreme Court to grant a writ of certiorari in this case. These will be discussed below.

As his first reason, Petitioner claims the opinion below of the Texas Supreme Court conflicts with the decisions of the U. S. Supreme Court as to the proper application of the preemption doctrine. Secondly, Petitioner asserts that the decision below raises significant and recurring federal questions. Finally, Petitioner claims the decision below was erroneous under settled Texas law regarding lack of subject matter jurisdiction. Because this Court has been given the opportunity to review two prior cases dealing with virtually identical fact situations, and has denied application for certiorari on both occasions, Respondent believes that all three of Petitioner's reasons can be answered by reference to these two cases.

Erspan v. Badgett, 647 F. 2d 550 (5th Cir. 1981), reh. denied, 659 F. 2d 26, cert. denied — U. S. — (1981) was a case in which the same question was presented as that which Petitioner seeks to raise in this proceeding. The Fifth Circuit Court of Appeals, in denying the retroactive effect of *McCarty v. McCarty*, 453 U. S. 210 (1981), observed that, as this Court stated in *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 398 (1981), "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[1] The *Erspan* case bore docket number 81-1155 in this Court and was denied

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[1] *Erspan v. Badgett*, 647 F. 2d 550 (5th Cir. 1981), reh. denied, 659 F. 2d 26, 28, cert. denied — U. S. — (1981)

application for certiorari on February 22, 1982. A few months later this Court again declined to review a Fifth Circuit Court of Appeals decision enforcing a final, unappealed Texas divorce judgment apportioning military retirement benefits. In *Wilson v. Wilson*, 667 F. 2d 497 (5th Cir. 1982), cert. denied — U. S. — (1982), the Fifth Circuit again refused to apply *McCarty v. McCarty, supra*, retroactively, relying on *Erspan v. Badgett*. The *Wilson* case bore docket number 81-1989 in this Court and received a "certiorari denied" designation on June 28, 1982.

Petitioner seeks to couch his arguments in terms of the preemption doctrine and a resultant lack of subject matter jurisdiction by the Texas court which rendered judgment of divorce. Although the *Wilson* and *Erspan* opinions do not specifically mention the preemption doctrine, the similarity of those fact situations with that in the present case compels the conclusion that the preemption doctrine was involved to the same degree in *Erspan* and *Wilson*. Preemption which would preclude subject matter jurisdiction is fundamental error, that is to say, it lies at the foundation of the court's power to render the judgment. It is the duty and the responsibility of the court to make a determination of its jurisdiction at the threshold, whether or not the issue is raised by the parties. *Aetna Casualty and Surety Company v. Hase*, 390 F. 2d 151, 154 (8th Cir. 1968); *Libhart v. Santa Monica Dairy Company*, 592 F. 2d 1062, 1064 (9th Cir. 1979). This Court would thus have considered the error of lack of subject matter jurisdiction resulting from preemption regardless of whether it was properly raised by the parties in the *Erspan* and *Wilson* cases. We must presume this Court was aware of any preemption problem involved in

the *Erspan* and *Wilson* cases and would not have denied certiorari had the outcomes in those cases been affected by that doctrine.

Preemption operates when a state court ignores existing federal law and renders judgment contrary thereto. *Kalb v. Feuerstein*, 308 U. S. 433 (1940); *Ex Parte Gaudion*, 628 S. W. 2d 500 (Tex. Civ. App.—Austin 1982, n.w.h.) This Court in speaking on the preemption of state law by federal law in *Ridgway v. Ridgway*, 454 U. S. 46 (1981) stated that "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to *clearly* conflicting federal enactments," and later in the same discussion noted that the state supreme court decision on appeal in that case frustrated "the *deliberate purpose* of Congress."[2] (Emphasis added.) In *Kalb v. Feuerstein*, *supra*, this Court reviewed a statute in which "Congress repeatedly stated its unequivocal purpose."[3] In the present case Congress had evinced no such clear, unequivocal purpose, as evidenced by the six to three decision[4] in *McCarty v. McCarty*, *supra*, by the number of years which passed before a state divorce decree dividing military retirement benefits was challenged, and by the absence of any clearly expressed federal legislation predating *McCarty*, as existed in *Ex Parte Johnson*, 591 S. W. 2d 453 (Tex. 1980). Furthermore, *McCarty* obviously did not reflect the clear intent of Congress, since Congress passed the Uniformed Services Former Spouses Protection Act in response to the *McCarty* decision and made the Act operative with respect to disposition of retirement

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[2] *Ridgway v. Ridgway*, 454 U. S. 46, 55 (1981)

[3] *Kalb v. Feuerstein*, 308 U. S. 433, 441 (1940)

[4] *McCarty v. McCarty*, 453 U. S. 210, 236 (1981) (Rehnquist, J., dissenting)

benefits one day prior to that on which the *McCarty* decision was issued.[5]

In summary, this case does not present a preemption issue, since no clearly expressed federal intent existed until this Court clarified the law in *McCarty*. Further, this Court reviewed and denied certiorari in two prior cases involving almost identical facts, *Erspan* and *Wilson*, and it would be inequitable to reverse this case on preemption grounds when no such consideration affected the outcome in those cases. Thus, the preemption doctrine cannot properly be applied to the instant case.

Because this Court has on two occasions previously considered and denied certiorari on cases involving virtually identical fact situations, and because Petitioner's assertions shed no further light on the issue, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For these reasons, the Court should refuse to grant a writ of certiorari in this case.

Respectfully submitted,

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[5] 10 U. S. C. § 1408(c) (1)